



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 32 OF 2018

WENCES TONUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 342 of 2014 delivered on the 5th day of June, 2018 by Hon. R. Yator SRM [delivered by Hon. J.L. Tamar, PM]

JUDGMENT

1. The appellant was convicted of five counts of making a false document, forgery, uttering false document and obtaining money by false pretences contrary to respective provision of the Penal Code as follows:

“CHARGE SHEET Dated 1.10.2014

COUNT I:

MAKING A FALSE DOCUMENT CONTRARY TO SECTION 357(A) OF THE PENAL CODE.

WENCES TONUI ALIAS WESLEY KIPKORIR TONUI: On an unknown date at unknown place in Bureti District within Bomet County, jointly with others not before Court with intent to defraud made a log book serial number KO66492Y purporting to be issued from Registrar of Motor Vehicles.

COUNT II:

FORGERY CONTRARY TO SECTION 349 OF THE PENAL CODE

WENCES TONUI ALIAS WESLEY KIPKORIR TONUI: On an unknown date at unknown place in Bureti District within Bomet County, jointly with others not before Court with intent to defraud forged an identity card number 1808200 serial number 2277507055 to be of KIPKOSGEI purporting to be issued from National Registration Bureau.

COUNT III

UTTERING A FALSE DOCUMENT CONTRARY TO SECTION 353 OF THE PENAL CODE.

WENCES TONUI ALIAS WESLEY KIPKORIR TONUI: On the 31st day of December 2013 at Litein Township in Bureti District within Bomet County, knowingly and fraudulently uttered a forged log book serial number K0664492Y to KIPLAGAT KIMETO DENNIS purporting to be issued from Registrar of Motor Vehicles.

COUNT IV

UTTERING A FALSE DOCUMENT CONTRARY TO SECTION 353 OF THE PENAL CODE.

WENCES TONUI ALIAS WESLEY KIPKORIR TONUI: On the 31st day of December 2013 at Litein Township in Bureti District within Bomet County, knowingly and fraudulently uttered a forged Identity card number 1800200 serial number 227507055 to KIPLAGAT KIMETO DENNIS purporting to be Identity Card of KIPKOSGEI KIMETO DENNIS issued from National Registration Bureau.

COUNT FIVE

OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE:

WENCES TONU ALIAS WESLEY KIPKORIR TONU: *On the 31st day of December 2013 at Litein Township in Bureti District within Bomet County, with intent to defraud obtained from KIPLAGAT KIMETO DENNIS Kshs.330,00/= by false pretending that you would sell Motor Registration number KBA 132 C Toyota Corolla to the said KIPLAGAT KIMETO DENNIS.”*

2. He was sentenced to imprisonment for three (3) years for count 1 and one (1) year each for counts 2, 3, 4 & 5, the sentences running concurrently from the date of sentence on 19/6/2018.

3. The Prosecution’s case was summarized in the testimony of Investigating Officer, Pw10, PC Oliver Nabonwe as follows:

“My finding were that the accused obtained Kshs.330,000/= from Pw1 by falsely pretending he would sell him a motor vehicle which was not genuine whose engine and chassis had been tempered with. Secondly the accused produced fake documents during the sale of that vehicle and had also presented himself as Wesley Kipkorir Tonui whereas he was Wences Tonui and in view of the same I charged him with offences herein including that of writing false documents to Pw1. The accused is the accused in Court (point out)”

4. The Prosecution called 10 witnesses to prove its case and when put on his defence the appellant raised an alibi defence as follows:

“DW1

I do not have a National Identify Card and its No.27121297 and in those names and my National Identity card the Police took from me on 22nd April, 2014. I do not know Wesley Kipkorir Tanui exhibits were produced in court concerning Wesley Kipkorir Tanui and I do not know why I was charged in Court yet I did not commit any offence.

Hon. R. Yator – SRM

Cross examination by Prosecution

I do not know Wesley Kipkorir Tanui and I did not use those names to defraud anyone. In 31st December, 2013 I do recall I was at home Transmara East and not in Bomet. Motor vehicle registration No. KBA 132C I have never had it in my possession and I do not sell it to Kiplagat Kimetto in the date stated. I was arrested in Bureti – Litein while I was at the market on 22nd April, 2014 and I was selling tomatoes and I could be found in Bureti – Litein doing business and it was my first time there. I do not sell motor vehicle to Kiplagat Dennis Kimetto using names Wesley and I did not use ID of names Kipkosgei Kibaror nor a fake logbook. I never went to Bomet at any time.

The two identity cards produced in Court with my photos is because the first ID I lost and I had to secure/renew with my names being Wences Tonui.

Hon. R. Yator – SRM

Re-examination

I have never been charged for being in possession of two IDs. Pexb 19 is my original ID pexb 5 Wesley Kiptanui ID. No. 20949929 done at M/s Bii Advocate and vehicle being sold was KBA 132C.

The advocate by names Bii never came to testify. I do not know Wesley Tanui. I never sold vehicle to Kibaror Kimetto Dennis. I come from Transmara East in Narok County. On 31st December, 2013 I was at home.

Hon. R. Yator – SRM”

Grounds of Appeal

5. The appellant’s petition of appeal set out the following grounds of appeal:

“PETITION OF APPEAL

1. The learned trial Magistrate erred in law and facts by finding that there was evidence of support the charge of making a false document contrary to section 357 (a) of the Penal Code, forgery contrary to section 349 of the Penal Code, uttering a false document contrary to section 353 of the Penal Code and uttering a false documents contrary to section 353 of the Penal Code.

2. The learned trial Magistrate erred in law and facts by finding that the testimonies of prosecution witnesses were contradictory but nonetheless proceeded to rely on the evidence to convict the appellant.

3. *The learned trial Magistrate erred in law and facts by relying on the secondary evidence against the provision of the Evidence Act.*
4. *The learned trial Magistrate erred in law and facts by relying on the secondary evidence against the provision of the evidence Act.*
5. *The learned trial Magistrate erred in law and facts by failing to consider the exhibit produced by the Defence which exhibit was a National Identity Card.*
6. *The learned trial Magistrate erred in law in the manner he analyzed evidence and thus drew wrong inferences and findings culminating to the conviction of the accused person.*
7. *The learned trial Magistrate misdirected herself on the law applicable in this case hence arrived a wrong conclusion resulting to a conviction of the accused person.*
8. *The learned trial Magistrate erred in law and facts by admitting the evidence of the prosecution yet the purported vital exhibits were not produced in Court.*
9. *The learned trial Magistrate erred in law and facts by ignoring the legal principal governing the circumstantial evidence and when to convict on the basis of such evidence.*
10. *The conviction was against the weight of the evidence adduced.”*

Submissions

6. The appellant filed the following written submissions corresponding to his grounds of appeal:

“WRITTEN SUBMISSION

My Lords having set down my Supplementary Grounds above, I now wish to expound upon them touching on matters of the law in the following order:

GROUND 1

My Lord’s I was apprehended on 24-4-2014 and detained for a period of 24 hours in police custody, where I was tortured. I humbly submit that this act violated section 72 (3) (b) former Constitution or Article 49 (i) (f) of the current Constitution and 50 (2) (a) which states that “every accused person has the right to a fair trial which includes the right to take the trial begin and conclude without unreasonable delay”

I content that the present case was unnecessary dragged on for one month, which violated even section 77 of the former Constitution and was informed to say the least.

That my Lord’s the learned Magistrate erred in both law and facts by finding that there were evidence to support the charges of making false document contrary to section 357 (a) of C.P.C, offering a false document contrary to section 353 of C.P.C and offering a false document contrary to section 353 of C.P.C. My Lord’s it’s clearly indicated in a lower Court proceedings that the person who sales the vehicle to DENNIS KIPLAGAT KIMETTO was namely WESLEY KIPKORIR TANUI. But not WENCES TANUI. Also my Lord’s the crucial witness were not availed that is Rotich and Ronoh who led Pw1 to the accused. And I do serious content that the learned Magistrate erred in both law and fact by finding that there were evidence to support the charges.

GROUND 2

That my Lords according to the testimonies of prosecution witness were contradictory and that makes Pw1 to be recalled again in Court file page 20 line 12 and I quoted “I wish to apply to recall Pw1,” my Lord’s that alone shows that prosecution had no evidence to support the charges as its an afterthought.

My Lord’s it’s trite that the first report should always be put into consideration wherever a witness alleges to have identified his/her victim in order to avoid later embellishment or tailoring of evidence.

“First report should be put in evidence so as to check or look whether or not a witness thinks he can identify the exhibits/suspect or not and by what reasons”

This issue was exhaustively tackled in the decided case of R. V. MOHAMED BIN ALLUI (1942) EA 72 where it was held that, written in above paragraph.

My Lord’s it’s clear that Pw1 did not state the means as demanded. Also he did not clarify the accused/suspect persons appearance on any sign which might lead the accused to be identify, he also identify the suspect while in dock.

GROUND 3

That my Lord's I am satisfied that only Rotich knows the person who led Pw1 and purchase the vehicle because he was the one who informed the Pw1 who is DENNIS. My Lord's just imagine such a vital witness was not brought to Court. I humbly contend therefore that the learned Magistrate grossly misdirected his/her self.

Also my Lord's the learned Magistrate goes further by stating in his judgment that see page 157 line 12 and I quoted "in this implies that the said identity card was forged and it's purpose was to defraud Pw1 whom the accused gave that copy after the sale agreement was entered flash-back my Lord's there is no real ID NO of accused engaged in any sale agreement with Wences Tanui

My Lord's while I was arrested I was found with my ID NO that is WENCES TANUI But not WESLEY.

GROUND 4

That they erred in law in rejecting my defence without giving proper reasons thus contravened section 169 (i) of C.P.C that some essential witness were not availed to testify despite that my defence which was strong and far outweighed the prosecution case.

My Lord's the burden of proof in criminal cases always lies upon the prosecution case to prove their case beyond any reasonable doubt.

I humbly submit that the present case falls below the above standards.

GROUND 5

That my Lord's the learned Magistrate erred in law by failing to consider the exhibit 1 produced at the defence which it was my personal identity card. Magistrate relied on identity of Wesley which brings contradictions I wish to rely on the decided case of RAMLERISHNA PANDYA V. R (1957) EACA 339 where it was expressed that,

"Where evidence is contradicted on inconsistent the Court should not rely upon it"

GROUND 6 AND 7 CONSOLIDATED

This witness never gave only descriptions to the police as he stated vide page 27 line 12 – 14" I never knew of the named Wences Tanui which I first heard in Court and I never used to know his names before he sold me the motor vehicle. And I contend that there was only docks identification which is totally worthless in law and was quite unfair. Kindly see the decided case of DAVID MUITA WANJA AND 2 others VRS REPUBLIC (2007) eKLR CA NRB before R.S.C OMOLLO PN ISAKI and W.S DEVERELL where it was held that.

"The value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with police standing orders.

I submit that the present case went contrary to the above except.

GROUND 8 AND 9 CONSOLIDATED

That it was trite, that the said exhibits were not brought to Court the learned Magistrate positively admitted the evidence of the prosecution and goes further by convicting the appellant. Only relying on secondary evidence, my Lord's I do believe that I am a mistaken identity.

My Lord's I mostly humbly pray for the total success of this appeal.

Conviction quashed, sentence set aside and I be set at liberty."

7. The DPP made the following oral submissions at the hearing opposing the appeal from both conviction and sentence:

"DPP

Appeal is opposed. The appellant was charged with 5 counts. Count 1 making a false document contrary to section 257 (a) of the Penal Code and sentenced to 3 years at count II forgery contrary to section 349 of the Penal Code and sentenced to 1 year at count III and IV altering false document contrary to section 353 of the Penal Code and sentence to serve 1 year in each. Count V obtaining money by false pretense under 313 of the Penal Code and sentenced to serve 1 year sentences running concurrently.

Pw1 testified that in December 2013, he sold his motor vehicle KAW 0225 Toyota station Wagon at Ksh. 450,000/- and he intended to purchase another one. He was told by his friend David to a person known as Rotich who in turn lend him to the appellant herein. The appellant had a car for sale Reg. KVA 132 C. The parties met at Litein. Pw1 negotiated with the appellant to the price of the vehicle and they agreed at the price 330,000/- and Pw1 bought the said vehicle.

Appellant informed Pw1 that the engine of the said vehicle that had been changed. At the time of the sale the appellant introduced himself Wesley Kipkorir Tonui. They drew a sale agreement in the firm of Bii & Co. Advocates and the sum of Ksh 330,000/- was paid to the appellant.

Pw1 drove his vehicle to Kaplong and got a buyer for the same vehicle to one Kenneth Langat at price Ksh. 400,000/-. He explained that he sold the vehicle so that he could make the profit of Ksh 70000/=. On 10/3/14, Pw1 was arrested by CID officers at Kapkatet and he had sold to Kenneth had been mentioned in theft. He tried to call the appellant but his phone was not going through. He called his friend David who in turn called Rotich the person who had introduced them to the appellant.

Both Pw1 and Rotich recorded their statements at Litein police station and were both instructed to locate the appellant. Appellant was arrested at Litein by AP officers after being identified by Pw1.

At the time of sale to Pw1 by the appellant he had issued him with a logbook and engine replacement receipt. The logbook for the vehicle KBA 132 C was in the name of Kipkosgey Kibaror serial no K0664924. The appellant also showed Pw1 an identity card of Kipkosgey Kibaror ID No. 1808200 serial number 22750755. He said that he had bought the said vehicle from Kipkosgei Kibaror but had misplaced the sale agreement. The engine replacement receipt from Masaku Prestige Spares (K) Ltd in the names of Kipkosgey Kibabor. The appellant gave Pw1 a copy of his ID card in the names of Wesley Kipkorir Tonui ID No. 20949929. He also gave Pw7 was the arresting officer. He stated that he arrested appellant through a warrant of arrest on 22/4/2014. He was arrested after he was pointed out to him by Pw1.

Upon arrest, appellant was searched and the original ID card with names Wences Tonui and photocopy of another ID card in the names of Wesley Kipkorir Tonui were found. On interrogation he said that Wesley Kipkorir Tonui was his Twin brother. This was the same ID card which had been used for the sale of the motor vehicle KBA 132C.

Pw1 positively identified to appellant as the person who had represented himself as Wesley Kipkorir and sold the said vehicle to him. Pw2 testified that in 2013 he was a driver of motor vehicle KBA 132 C and was employed by Kipkosgey Kibaror and the said vehicle operated as a taxi within Ravine and Solian. On 3/3/2014, at about 11.00 am he received a call from his employer Kibaror informing him that there was a vehicle at Ravine Market which had the same registration number as his vehicle. He went to Ravine market and saw the vehicle and confirmed that the vehicle was indeed similar in make and colour. There was someone selling pineapples from the same car. He reported the matter to police who detained the vehicle which was at the market and no also asked to surrender this vehicle to the police station, which he did. He later collected the original logbook and other documents which he forwarded to the police.

Upon investigation, his car was retained as it was confirmed to be genuine, which the other one which the appellant had sold to Pw1 was detained. The logbook of the motor vehicle which was released was confirmed to be genuine.

Pw4 was the owner of the genuine vehicle and his name was Kipkosgei Kibaror. He stated that he did not know the appellant. Pw9 was a scene crime expert and he stated that he noticed that both vehicles had the same registration number KBA 132C make Toyota Station Wagon and both were white in colour and he viewed them at Eldama Ravine police station. He classified the vehicles as A and B. Vehicles A was registered in Kipkosgey Kibaror was manufactured in year 2000 and chases EE10400422523 Engine no.5E1069339 it was registered in names of Kipkosgey Kibaror. He testified both the engine and chasses were genuine and their spacing and alignment had not been tampered with and were original.

The other vehicle B is the vehicle that Pw1 bought from the appellant did not have a year of manufacture and the chases number which was the same as that motor vehicle had been interfered and the spacing and alignment were not proper. The said number was at its right place. It was stamped on a foreign place which was welded as her firewall of the motor chasses.

Pw10 was the investigating officer testified that after the 2 vehicles were impounded, he took both logbooks from motor vehicle A from Kipkosgey Kibaror and the second from Kenneth Langat the person who bought the vehicle from Pw1. He forwarded both logbooks to registrar of motor vehicles for authentication. A report from the Registrar of motor vehicles indicated that the logbook from motor vehicle A from Kibaror was genuine and the one from motor vehicle B from Kenneth Langat was fake and had not originated from their offices. Further investigation revealed that the ID No. 1808200 presented to the appellant to Pw1 as one belonging to Kipkosgey Kibaror was not genuine. ID No. 1808200 according to registrations of persons was being held by Daniel Kipkoech Kirui while the serial number 227507055 on the same ID card was used to process ID No. 1251038 legally held by one Austin Kipkoech. The Registrar of persons further confirmed that the ID No. in the names of Wesley Kipkorir Tonui No. 20949929 was indeed for Wesley Kipkorir.

He further went ahead to establish the authenticity of ID 27121297 serial No. 237426873 in the names of Wences Tonui.

Pw10 forwarded the appellant's fingerprints to the Registration Bureau and it was established that the fingerprints belonged to the appellant Wences Tonui.

The appellant's names were therefore not Wesley Kipkorir Tonui as he had presented himself during the sale of the car. The ID is name Wesley Kipkorir was not genuine and the one in the name Wences Tonui was genuine and belonged to the appellant as the fingerprints were the same.

It is our submissions that the appellant herein had an intention to defraud Pw1 as he registered himself as Wesley Kipkorir Tonui and issued a fake ID card and a fake logbook and a fake ID card in the names of Wesley Kipkorir and the other fake ID card in the names of Kipkosgei Kibaror.

The appellant obtained a sum Ksh. 330,000 from Pw1 falsely pretending to sell the vehicle to him knowing it was not genuine as the engine and chasses had been tampered with and the documents were not genuine.

Upon arrest the appellant stated that Wesley Kipkorir Tonui was his twin brother and that is why he had his card. However, in his defence he said he did not know the said Wesley.

The contradiction indicates he had intention to defraud the complainant. It also indicates that there was another motor vehicle in the names of Kipkosgey Kibaror as those were the names of the genuine vehicle.

The sentence of imprisonment for 3 years in count and 1 year in each count II –IV were lenient considering the high level of fraud.

I urge the court to dismiss appeal for deterrence. That’s all.”

Issues for determination

8. Having considered the submissions of the parties, the issues that arise in the appeal are:

- (a) Whether the offences of making false document, forgery writing and obtaining by false pretences were proved; and
- (b) Whether the appellant was shown to have been the perpetrator.

Determination

9. The Penal Code provides the definitions for the offences of making false document and forgery as follows:

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

346. In this division of this Code, “document” does not include a trade mark or any other sign used in connexion with articles of commerce though they may be written or printed or in electronic form.

347. Any person makes a false document who –

(a) makes a document purporting to be what in fact it is not; or

(b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or

(c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document; or

(d) signs a document –

(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; or

(ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; or

(iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; or

(iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

(e) fraudulently-

(i) makes or transmits any electronic record or part of an electronic record;

(ii) affixes any digital signature on any electronic record, or

(iii) makes any mark denoting the authenticity of a digital signature, with the intention of causing it to be believed that such record, or part of document, electronic record or digital signature was made, signed, executed, transmitted or affixed by or by the authority of a person by whom or whose authority he knows that it was not made, signed, executed or affixed;

(f) without lawful authority or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with a digital signature either by himself or by any other person, whether

such person is living or dead at the time of such alter

(g) fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practised upon him, does not know the contents of the document or electronic record or the nature of the alteration.

348. 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.”

10. The appellant would have made false document for making a log book as charged in Count I if it were proved that the entries were false and forged the motor vehicle owner's Identity card as charged in Count II, at the same time uttering the two documents and obtaining the money proceeds of sale of the motor subject vehicle and that he was the person who had committed the relevant acts.

11. The only evidence, however, that placed the appellant in the alleged scene of crime where he is said to have obtained money by false pretences is given by the complainant Pw1 whose testimony is set out in full as follows:

“PW1

I come from Kamine, Bomet County and **I am timber trader and part time preacher** and business I do at home.

In December, 2013 I do recall I had a motor vehicle Reg. No. KAW 022J make Toyota Saloon car Station wagon and intended to sell it and I had given out information that I intend to sell and I got a buyer and sold it at Kshs.450,000 to one Geoffrey.

On 31st December, 2013 I asked for another vehicle to purchase after I had sold the other one and my friend David Rono called that he had seen a vehicle in Litein while with another Rotich and that I go see it and that day I went with Ronoh to Litein and we found Rotich who led us to Wesley who was owner of the vehicle to be sold.

We met with Wesley at Litein town and negotiated on the price after Wesley (accused) point out, had shown me the vehicle he intended to sell saying the vehicle was his which he had bought and it was Reg. KBA 132C make a white station wagon – Toyota and I do not recall if it had a sticker “for sale”.

We negotiated and agreed on a selling price of Kshs.330,000 and in fact I had opened the vehicle and on seeing the engine they told me they had changed the engine as the earlier one had got spoilt. I then did a road test with the vehicle and done it shortly and I was satisfied with it. We then went to an advocate in Litein together with accused, Rotich and David and the advocate was one Bii and I counted the money after entering the agreement and I paid accused Kshs.330,000.

I was given copy of sale agreement and another remained with the advocate. I signed the agreement as well as accused and the witnesses and advocate signed it.

After that everyone went their way and I went with the vehicle up to Kaplong when I received a phone call from my neighbor one Wesley asking if I had sold my previous vehicle and told them I had sold yesterday and had purchased another one today and I told them to come check the current vehicle at Kaplong and they came to Kaplong and Wesley my neighbor who was with a buyer who asked if I could sell it to them and we agreed on a price of Kshs.400,000 as it was already late. We went up home and they paid me some cash and topped with Mpesa and paid in total Kshs.400,000 and people present was myself., Wesley, the buyer and another person and my wife Betty Chepkorir was present and the person who was with the buyer wrote the agreement which we signed and I released the vehicle to them.

I recorded the new buyers name at the Police when I wrote my statement later and I can confirm with the statement and it was one Kenneth Langat (reads statement).

On 10th March, 2014 I do recall I was at Kapkatet hospital where my father was admitted and was around lunch time and while escorting visitors who had come to see the patient I met with two gentlemen at the hospital's gate saying they were CID officers from Eldama Ravine and they identified themselves and handcuffed me saying I accompany them they will explain ahead. On taking me ahead I met Kenneth Langat and the person he was with when he came to buy the vehicle who was one Geoffrey and friend to Kenneth Langat and who had witnessed the sale.

The officers asked if I knew Kenneth or if I had sold him the vehicle and I confirmed I did and they told me the vehicle was involved in theft. We spent at a hotel in Litein and I told the officers I had contacts of the person who had sold it to me and that I call them to explain. In the morning I tried calling accused's number and it was not going through. I had first called Ronoh who had led me to Wesley accused and I told him the vehicle had problems and he told me to look for Rotich because he knew the seller.

I then called Rotich and lied to him someone wanted to buy a vehicle so he comes and he came to Litein and I was standing at 20 meters away and showed the CID officers he was the one and he tried to run away and they went to arrest him and were escorted to Litein Police Station and recorded statements and the CID officers told us we be reporting at Litein Police Station then they released us and they asked us with Rotich to try locate Wesley who had sold us the vehicle and I never used to know his home but Rotich knew but did not want to disclose the accused's whereabouts. I was called to Eldama Ravine with my wife and after recording statements asked we look for ways to arrest accused and I asked them to give AP officers from Kapkatet authority to

arrest accused as they did not know him.

Accused was arrested at Litein and I identified him to AP officers and I called the CID officers who asked us to take him to Litein Police Station which we did and he was locked in and later CID officer came and escorted him to Eldama Ravine Police Station.

On 31st December, 2013 accused showed me a logbook and the engine receipt he said he had changed engine with. The logbook was in names of Kibaror which I took while I sold it I gave to the new buyer. I have a logbook – MFI 1 Reg. No. KBA 132C, serial No. KO66492Y make Toyota Corolla Station Wagon and registered owner was Kipkosgei Kibaror and white in colour.

He told me he had bought the vehicle from Kibaror and could not locate the sale agreement and he also showed me a copy of ID of Kibaror.

- Photocopy Id of Kipkosgei Kibaror ID. No.13065335 serial No.200728166 – MFI 2.

- He gave me the engine receipt and other documents and it was receipt of “Masaku Prestige Spares Kenya Ltd.” – MFI 3 (receipt and in names of Kibaror Kipkosgei dated 15th August, 2012 and description of item is “engine for Toyota” and amount is Kshs.50,000.

- It was attached to other documents he said were also receipts for the engine and I did not peruse through the seven paged document written “Masaku Prestige Spares Kenya Ltd “ dated 15th August 2012 and addressed to Kenya Revenue of Motor vehicles Box 30440 Nairobi. Engine No. Kibaror Kipkosgei has been sold to M/S 5102215 P O Box 19157 Nairobi. Its engine rating is 1800CC and it was signed by general manager but not stamped seven paged document – MFI – 4.

I gave Police the sale agreement we signed before the advocate and it is the one before Court – MFI 5 (photocopy) sale agreement of motor vehicle and vendor is Wesley Kipkorir Tanui ID. No.20949929. P O Box 72 Litein. The vendor was accused. Purchaser is Kiplagat Kimeto Denis ID No.22191243 who is myself Box 227 Sotik which is my address.

Property being sold is Reg. No. KBA 132C registered in names of Kibaror Kipkosgei P.O Box 19157 – 00501 Nairobi make Toyota Corolla Station Wagon white in colour and indicates chasis No. EE 104 – 0042253. Engine No. 5E – 2088312. The vendor signed and his names Wesley Kipkorir Tonui indicate in presence of purchaser Kiplagat Kimeto Denis and witnesses were Kipyegon Rotich and Bernard Too David Ronoh were all signed and were present.

Drawn by M/S Bii vs. K & Co. Advocates Box 331 Litein and advocate stamped and signed it.

I also had photocopy of accused ID card which I gave to the Police and I also gave out photocopy of my ID which is in Court MFI – 6 copy of ID of Kiplagat Kimeto Denis ID 22191243. Later I saw the motor vehicle at Eldama Ravine Police Station and before I purchased the vehicle from accused I had never seen him.

Accused also gave me the PIN certificate (photocopy) of Kibaror and its the one in Court.

KRA receipt of payment No.212013032010056E in names of Kibaror Kipkosgei and its dated 01.02.2013 amount Kshs.625 – MFI 1

I do not know where accused got the vehicle he sold me.

Cross examination by Bosire

Accused sold me motor vehicle Reg. No. KBA 132C which I hear is at the Police Station and not in Court and I have not been shown the photographs of the vehicles in Court.

Wesley my neighbor called me when I had just bought the vehicle and same day I sold the vehicle and I had not met the buyers before that day. I suspected they could be thugs and I took them upto home and they drafted the agreement which I gave to the Police. I could not recall name of buyer off head as it has been along time but needed to confirm with statement.

The photocopy of sale agreement – MFI 5 I gave the original to the Police and I have not produced original.

The Kshs.400,000 for sale of the KBA 132C I received cash of Kshs.370,000 and Kshs.30,000 through Mpesa and I do not have the statement in Court. As per MFI 2 ID. No. is 13065335.

Hon. R. Yator – SRM

Re-examination

The original of MFI 5 I gave to the Police and the one in Court is photocopy of the original. I was not the investigator and I am just the witness and I do not know if Police took the transaction from Mpesa.

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12. The evidence of Pw2 – Pw10 relate to the events subsequent to the alleged sale of the motor vehicle KBA 132C by the appellant to the complainant Pw1, initially the re-sale thereof which is allegedly witnessed by the purchase Pw3, his friend Pw5 (Geoffrey Kiprotich Mutai), the complainant's wife Pw6 the discovery of the another vehicle with the same registration number KBA 132C and consequent investigators revealing the motor vehicle allegedly sold by Pw1 to Pw3 as fake as testified to by Pw2, (the driver employed to operate the genuine KBA 132C as a tax at Eldama Ravine, by the registered proprietor of the vehicle Kibaror Kosgei, Pw4 and by Pw9, the scene of crime officer Jonstone Wahome who on invitation by the Investigation Officer Pw10 examined the two vehicles with the same registration number at Eldama Ravine Police Station, and the evidence of Pw7 APC Jared Ogendo who arrested the appellant in execution of a warrant of arrest from Eldama Ravine CID headquarters and who on carrying a search on the appellant upon arrest found with "an ID with names Wences and a photocopy of ID in names Wesley and he said Wesley was his twin brother who was not around at the time." Pw8 is the registrar of persons in Koibatek who verified the ID No.27121297 in the names of Wences Tanui and fingerprints of the appellant as highlighting to the said Wences Tanui according to the registration data base, and confirmed that ID card allegedly presented by the appellant to Pw1 under serial no.227507055 ID No.1808200 was fake as the two numbers belonged to two different ID card documents held subsequently by one Austine Kipkoech and Daniel Kipkoech A. Kirui.

13. From this evidence, it clear that the motor vehicle being the no.KBA 132C sold by Pw1 to Pw4 Keneth Kiplagat was not genuine as it had its engine and chassis numbers tempered with, that the log-book held by Pw1 and the ID card for the perpetrator proprietor were fake as the registration owner Pw4 had different log-book and ID card both contradicted by the Registrar of motor vehicles and the Registrar of Persons, respectively; and that Identity card held by Pw1 allegedly given by the appellant as the car belonged to a person named Wesley Kipkorir Tanui and though genuine did not belong to the person who allegedly uttered, if the appellant herein who was by investigation of his fingerprints against the Registrar of Persons confirmed to be Wences Tonui.

14. On his evidence, the offences of making a document with respect of log-book no. K066492Y and forged an ID card belonging to the registered owner of the motor vehicle KBA 132C, and uttering false documents with respect to the said document were committed. If it can be demonstrated on the evidence that the appellant did enter into the sale transaction as alleged by the complainant. The offence of obtaining by false pretences is also committed; if it can be shown that it was the appellant who sold the fake vehicle KBA132C to Pw1.

15. Would that is the evidence that the appellant sold the fake motor vehicle to Pw1 using the forged documents under alias of Wesley Kipkoech Tanui?

16. It was Pw1 evidence that he had after selling his vehicle KAW 022J in December 2013 that his friend David Rono called him to say that he had seen a vehicle in Litein with another Rotich and that he stated so and see it and on the same day 31/12/13 he went to Litein with Rono and found Rotich who had name to Wesley (the accused) who was the owner of the vehicle to be sold. The sale of the motor vehicle was registered and the whole paying of the complainant, Pw1, the accused, Rotich and his friend Rono then went to advocate Bii in Litein where a sale agreement was signed and Kshs.330,000/= purchase price paid to the accused.

17. The complainant's friend David Rono and his contact person Rotich who had identified the motor vehicle for Pw1 to belong were not called as witnesses, neither was the advocate before whom the sale agreement was signed.

18. The sale agreement was drawn in the name of vendor as Wesley Kipkorir Tanui ID 20949929 which was verified as genuine by Registrar of Persons for a person so called but the accused was identified as Wences Tanui.

19. Pw1 said he never knew the accused by the names of Wences Tonui "which I first heard in Court and I never used to know his names before he sold me the motor vehicle." "Wesley" is known by the complainant Pw1 only the name Wesley when according to Pw7 the APC Arresting Officer Jared Ogendo he was upon arrest found with an ID with the names Wences Tonui which was upon Investigation verified as genuine by finger-print verification with data-base at the Registrar of Persons.

Principle of untrustworthy lead witness

20. I accept as a useful guide the assessing the credit-worthiness of a witness, the principle in the Court of Appeal decision in *Ndungu Kimanyi v. R* (1979) KLR 282 that:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."

21. While the complainant, Pw1, who is the only witness as to the appellant's alleged involvement in the sale of motor vehicle KBA 132C to him states that he had on some undisclosed dated in December 2013 sold his Toyota saloon station wagon KAW 022J at Kshs.450,000/= to one Geoffrey, Pw1's own wife Pw6 testified at length and steadfastly even upon cross-examination and re-examination that she had witnessed the sale by her husband Pw1 of the motor vehicle, not KBA 132C as alleged by the Prosecution's case, but KAW 022J. The testimony of Pw6 is set out in full as follows:

"PW6

I come from Sotik – Kaplong I am a house wife. On unknown date in December, 2013 I was at home when my husband one Dennis – Pw1 called me saying he was coming with visitors and he arrived with Geoffrey and Kenneth and one alias Macho nne and my husband told me they were interested in buying his vehicle which number plate I do not recall though I recovered in my statement (refers) Reg. No KAW 022J and he negotiated with them as I was in the Kitchen. He later said they had agreed the price and I saw them make payment and they entered a sale agreement and I was called to sign as a witness. My husband received the money and that some was to be send via Mpesa or later it was send and my husband told me it had been send. I did not know exact cash he received and I was present while being counted and it was Kshs.370,000 and later he send Kshs.30,000 to my husband and he took

the vehicle and later we were called and told telling us the vehicle we had sold had an offence and my husband showed them the seller and I ever saw the seller and accused is in Court.

Hon. R. Yator – SRM

Cross examination

The sale agreement was between my husband who had brought it from one Wesley and I did not know exact registration number and it was brought to our home. At that time that was the only vehicle I have been recorded in my statement Reg. No. was KAW 022J and it was on 31.12.2013. I witnessed the sale of vehicle and not when he brought it. Vehicle was sold at Kshs.400,000 and PW1 received Kshs.370,000 and there was a balance of Kshs.30,000 paid by Kenneth and accused was not present during that transaction and I never saw him bring any logbook nor witness him sign any agreement.

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Re-examination

Vehicle sold was Reg. No. KAW 022J but we had another vehicle before.

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22. It is not clear who between Pw1 and his wife Pw6 is telling the truth. Moreover, Geoffrey, if he be the witness who testified as Pw5, and who appears to have been at the sale of the motor vehicle KBA 132C to Kenneth Kiplagat Pw3, did not mention anything at all of a prior purchase of a motor vehicle KAW 022J.

23. It is unusual that the complainant who is not a motor vehicle dealer, but who rather describes himself as **“a timber trader and part-time preacher”** could have bought motor vehicle KAW022J on some **undisclosed** date in December 2013, bought and sold motor vehicle KBA132C in two carefully chronicled transactions on the same date 31st December 2013, but which sale the complainant’s wife insisted was for the motor vehicle KAW022J alleged sold earlier. No explanation was given for this unbelievable conduct, and this goes to water down the credibility of the complainant as witness of truth.

24. In addition, crucial witnesses who could have vouched for the sale by the appellant of motor vehicle KBA 132C to the complainant Pw1 namely, David Rono, Benard Too, Kipyegon Rotich and the advocate who witnessed the sale agreement did not testify.

25. As held in **Kingi v. R** (1972) EA 280 (sir James Wicks, CJ and Simpson, J) and **Bukenya & ors v. Uganda** (1972) EA 549 (Court of Appeal, Spy Ag. P. Lutta, Ag V.P and Mustafa J.A.), the Court is entitled to infer that the evidence of uncalled witnesses would have been adverse to the Prosecution case, where the evidence called is barely adequate. See also **Nguku v. R** (1985) KLR 412.

26. The evidence of Kipyegon Rotich, especially, being the one who introduced the complainant (Pw1) to the accused KBA 132C was crucial to support the sole testimony of the complainant identifying the appellant as the person who sold to him the vehicle under an usual name Wesley Kipkorir Tanui. There should have been the difficulty in calling the witness as the testimony of the Pw1 is that he had been arrested, together with Rotich and Rono as persons who were involved in the sale without the evidence of Rotich all that remains is the testimony of Pw1 forgering the appellant as the person who sold the vehicle to the complainant but which evidence is contradicted by the complainant’s own wife and unsupported by that of Geoffrey who is supposed to have purchased the complainant’s previous car to enable him purchase the vehicle subject of the crucial charge.

27. That as testified by Pw7, the appellant was upon arrest found with a photocopies of an ID belonging to Wesley Kipkorir Tonui who he said was a twin brother does not support the testimony of Pw1 that he was involved in any fraudulent sale of any motor vehicle to the complainant who evidence is inconsistent with that of his witness wife and unsupported by the evidence of Geoffrey to the alleged to have sold a previous vehicle.

28. There are serious doubts as to (a) whether the appellant ever sold motor vehicle KBA 132C, the subject of the charge before the Court to the complainant, Pw1; (b) whether the vehicle the complainant sold was KAW 022J and, therefore, (c) whether the appellant had made the fake documents of the log-book, forged the registered proprietor’s Identity Card and obtained money by false pretence from the complainant by pretending to sell to him the motor vehicle subject of the charge. Those doubts must be credited to the appellant.

29. The forgery of documents involved in this case must have involved several persons in the both the registrar of motor vehicles and Registrar of Persons as to be properly described as a syndicate, and in the lack of witnesses to positively identify the appellant, if that were the case, as one of the perpetrators of the forgeries and resultant offence of obtaining money by false pretences may indicate that the appellant was left to dry as the scape-goat.

30. The court encourages the efforts by the police to prevent motor vehicle theft and related dealing with fake vehicles, making necessary false documents and or forgery thereof and in particular commends recently reported crackdown motor vehicle theft syndicate in Eldoret area in the neighborhood of Litein, where the subject transaction occurred. However, the suspects are entitled to constitutional fair trial guarantees to conviction only by proof beyond reasonable doubt applicable to criminal cases and, therefore, to acquittal where that standard of proof is unmet.

Orders

31. Accordingly, for the reasons set out above, the court finds merit in the appellant's appeal from both the conviction and sentences for the offences of making a false document, forgery, uttering and obtaining by false pretences contrary to the respective provisions of the Penal Code as set out in the five counts of the Charge Sheet dated 1/10/2014, above. The convictions are quashed and the sentence set aside.

32. There shall, therefore, be an order for the release of the appellant from custody unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2019.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.